IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1128

PHOENIX NEWSPAPERS, INC., a corporation; and MICHAEL PADEV,

Appellants,

vs.

WADE CHURCH,

Appellee.

Jurisdictional Statement on Appeal From the Court of Appeals, State of Arizona, Division One, Department B.

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Dated: February 6, 1976.

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Jurisdictional Statement on Appeal From the Court of Appeals, State of Arizona, Division One, Department B.

Jurisdictional Statement.

Appellants appeal from a Judgment of the Court of Appeals of the State of Arizona, Division One, Department B, filed July 15, 1975, affirming a Judgment of the Superior Court of the State of Arizona, in and for Maricopa County, awarding damages against these appellants in a civil libel damage action brought by appellee, Wade Church, then Arizona Attorney General and a candidate for re-election, in the sum of $485,000 ($250,000 actual damages and $235,000 punitive damages). Eugene C. Pulliam, publisher of the Newspapers involved, was a party below but the case, as to him, was reversed for a new trial. He is now deceased.

Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal, pursuant to 28 U.S.C. 1257(2), and that substantial federal questions are presented.

Alternatively, should the Supreme Court consider Section 1257(2) inapplicable to the issues presented by way of appeal, then appellants respectfully request that the Court consider this Jurisdictional Statement in its entirety as a Petition for Writ of Certiorari pursuant to 28 U.S.C., Sec. 2103.[1]

Opinion Below.

The Opinion of the Arizona Court of Appeals was entered and filed July 15, 1975 and is reported in 537 P.2d 1345, 24 Ariz. App. 287. Appellants timely filed a Motion for Rehearing in the Court of Appeals which was denied by an unreported Order of that Court entered and dated September 15, 1975.

Appellants thereafter timely filed a Petition for Review with the Arizona Supreme Court which was denied by that Court in an unreported Order dated and entered December 9, 1975.

The Decision of the Arizona Supreme Court reversing the Judgment upon the first trial of this claim is found at 447 P.2d 840, 103 Ariz. 582.

Copies of the July 15, 1975 Opinion and Judgment of the Court of Appeals and of the unreported Orders of that Court and of the Arizona Supreme Court,

[1]Claims of denial by Arizona Courts of Petitioners' First Amendment rights which are not properly presented by appeal are included as within this Court's jurisdiction under the provisions of 28 U.S.C., Sec. 1257(3). *Flourney v. Wiener*, 321 U.S. 253, 264.

denying appellants' Motion for Rehearing and Petition for Review, are set forth in the Appendix. A copy of the Judgment of the Superior Court of Maricopa County, Arizona, affirmed by the Court of Appeals also appears in the Appendix.

Jurisdiction.

Appellants filed their Notice of Appeal to the United States Supreme Court from the Judgment of the Court of Appeals in the office of the Clerk of the Court of Appeals, at Phoenix, Arizona, on December 12, 1975.

Cases Sustaining Jurisdiction on Appeal.

Cases believed to sustain the jurisdiction of the Supreme Court on Appeal are:

(a) As involving a State Court Rule not adjudicative in character;

Lathrop v. Donohue, 367 U.S. 820, 824-827;

(b) As involving a State Statute fair on its face but contravening the United States Constitution as applied:

Dahnske-Walker v. Bondurant, etc., 257 U.S. 282;

Bantam Books v. Sullivan, 372 U.S. 58;

Fiske v. Kansas, 274 U.S. 380;

Hanson v. Denckla, 357 U.S. 235;

Cohen v. California, 403 U.S. 15;

Marcus v. Property Search Warrant, 367 U.S. 717, 6 L.Ed 2d 1127, 81 S.Ct. 1708.

The Statutes Involved on Appeal.

Rule 50(a), Arizona Rules of Civil Procedure, Vol. 16, A.R.S., p. 540, provides:

> "50(a) When made; effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence, in event the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor."

Rule 50(b), Arizona Rules of Civil Procedure, Vol. 16, A.R.S., p. 460, provides:

> "50(b) Motion for judgment notwithstanding the verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion

> for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

Vol. 12, Section 12-2102 A.R.S., p. 558, provides:

> "Scope of review by supreme court upon appeal from final judgment.
>
> "A. Upon an appeal from a final judgment, the supreme court shall review any intermediate orders involving the merits of the action and necessarily affecting the judgment, and all orders and rulings assigned as error, whether a motion for a new trial was made or not.
>
> "B. If a motion for new trial was denied, the court may, on appeal from the final judgment, review the order denying the motion although no appeal is taken from the order.
>
> "C. On an appeal from a final judgment the supreme court shall not consider the sufficiency of the evidence to sustain the verdict or judgment in an action tried before a jury unless a motion for a new trial was made."[2]

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[2]The Arizona Supreme Court and the Court of Appeals in passing upon appeals from trial court judgments, based upon claimed error in trial court rulings upon motions for directed verdicts or for judgment n.o.v., has uniformly historically

(This footnote is continued on next page)

Questions for Review.

Question I.

Whether Arizona Rules of Civil Procedure 50(a) and 50(b) as applied by the trial courts in this case, as required by controlling Arizona precedents construing these Rules, in passing upon the sufficiency of the proof of "actual malice" in ruling upon appellants' Motions for directed verdict and n.o.v., and whether Section 12-2102 A.R.S. as applied by the Court of Appeals in this case as required by controlling Ari-

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adhered to the rule that the trial court in considering a motion for a directed verdict or a motion for judgment n.o.v. in cases involving a plaintiff's claims must accept all evidence admitted, favorable to the plaintiff, as true, must draw all permissible inferences in favor of plaintiff and must view all the evidence in a light most favorable to the plaintiff.

In re Est. of Accomazzo, (1972) 16 Ariz.App. 211, 492 P.2d 460;
Hudlow v. American Estate, etc., (1974) 22 Ariz.App. 246, 526 P.2d 770;
Lancaster v. Chemi-Cote Perlite, (1973) 20 Ariz.App. 229, 511 P.2d 673;
Anderson v. Muniz, (1973) 21 Ariz.App. 25, 515 P.2d 52.

On appeal Section 12-2102 A.R.S. has uniformly been given the same reading and the same rule governs the review function of the appellate tribunal. This is true even though the appellate court would have reached a different conclusion based upon its review of the evidence and permissible inferences to be drawn therefrom.

Rouillier v. A & B Schuster Co., (1916) 18 Ariz. 175, 157 Pac. 976;
Fritsche v. Hudspeth, (1953) 76 Ariz. 202, 262 P.2d 243;
State v. Ramos, (1972) 108 Ariz. 36, 492 P.2d 697;
Yahnke v. State Farm Fire & Cas. Co., (1966) 4 Ariz.App. 287, 419 P.2d 548;
Lehman v. Whitehead, (1965) 1 Ariz.App. 355, 403 P.2d 8;
Vreeland v. State Board of Regents, (1969) 9 Ariz. App. 61, 449 P.2d 78;
Farmers Inv. Co. v. Galloska, (1966) 4 Ariz.App. 346, 420 P.2d 489.

zona precedents in reviewing the sufficiency of the proof of actual malice on appeal, contravene the First and Fourteenth Amendments to the United States Constitution since, as applied by the Arizona Courts, neither a trial judge nor an appellate court may independently review and appraise the evidence to make sure the proof of "actual malice" in a civil libel damage action brought by a public official against a newspaper measures up to the standards stated in *Times v. Sullivan,* 376 U.S. 254, but must accept all evidence offered as true, draw all inferences as supporting proof of actual malice, and otherwise judge the proof in a light most favorable to sustaining adequacy of the proof of actual malice?

Question II.

Whether—in a libel damage action brought against a newspaper, its publisher and the author of an editorial published by the newspaper by a public official and candidate for re-election claiming to have been libeled because of an asserted false editorial opinion that a public proposal made by the public official that labor should sponsor "people's councils" to offset the influence of "special interests" in the Legislature in the opinion of the newspaper recommended an idea which had been proposed, sponsored and utilized by communists for infiltrating governments and seizing political power, since, in fact, the newspaper did not entertain any such opinion—admissions by the author that he did not believe the official was a communist or communist sympathizer and by the publisher that he didn't know whether the official was a communist or not, constituted a showing of knowing falsehood

judged by the standards of proof required by *Times v. Sullivan,* 376 U.S. 254, sufficient to support a finding that the newspaper, its publisher and the author of the editorial were actuated by "actual malice" in publishing the editorial?

Question III.

Whether, in a libel action as outlined in Question I, *supra,* it appearing without dispute that when the challenged editorial was written and published:

1. The public official—and candidate for re-election—in fact in a public speech at a labor convention had recommended that labor sponsor "people's councils" to offset the influence of "special interests" in the Legislature;

2. In fact the "people's council" idea historically and to the present time has been and is a commonly known communist technique used in infiltration of governments and ultimate seizure of political power—that the words "people's council" are almost words of art to one knowledgeable about communism as indicating that technique;

3. The author of the editorial was very knowledgeable about communism including the knowledge that innocent dupes among "left wingers" were often used by communists to advance their proposals;

4. The background of the official, to the knowledge of the author of the editorial, was that of a "left winger" who believed Russia's economic democracy superior to America "because big capital doesn't control it"; and who in public

speeches repeatedly, "savagely" and "brutally" attacked the Legislature as venal, other public officials as wrongfully extending financial favors to speculators and banks and insurance companies as greedy and oppressive of the public, a typical communist tactic in laying the groundwork for a "people's council" proposal;

did admissions by the author of the editorial and publisher of the newspaper of lack of belief that the official was in fact a communist or communist sympathizer constitute sufficient evidence to support a finding with "convincing clarity" that the Newspaper and its publisher and editor *knowingly* falsely stated that in the opinion of the newspaper the proposal made by the official was of an idea long associated with communists when in fact the Newspaper, its publisher and the editorial writer did not hold the opinion that the "people's council" idea referred to, or *reasonably could be read as referring to,* a communist device or technique?

Question IV.

Whether, assuming that a public proposal is made by a public official under such circumstances that it can be understood as making a recommendation which could seriously adversely affect the public legislature processes, a newspaper editor and publisher to avoid being exposed to a large libel damage verdict must:

(a) Assume that the public official really does not intend to recommend a dangerous idea even though members of the public may understand it as advocating a course injurious to the public, and avoid attacking the idea; or

(b) Make inquiry of the public official as to the sense in which he made the proposal and, if the official claims an innocuous meaning was intended, refuse to risk warning the public of the dangers inherent in acceptance of the proposal?

Question V.

Where the evidence in the case outlined in Question I, *supra,* was not in dispute:

(a) That Padev, the author of the editorial, was the Foreign Affairs Editor of Arizona Republic without any responsibilities in local matters, but undertook to research and write the editorial in question upon his own initiative and responsibility because of a strong personal reaction to the "people's council" idea of the Arizona Attorney General as a very dangerous idea; and

(b) That Eugene Pulliam had heard the radio reports of the "people's council" proposal and had read the two Phoenix Newspaper accounts of the speech and, as President of Phoenix Newspapers and publisher of Arizona Republic, the paper which published the editorial, personally reviewed the editorial prepared by Padev with Padev and based upon his complete confidence in Padev's knowledge of communism and his own considerable experience and knowledge of "people's councils" as a communist technique and practice, *on his sole responsibility,* and authority, *directed* publication of the editorial;

can a finding of "actual malice" on the part of Phoenix Newspapers, Inc., in publishing the editorial as directed by the publisher, Pulliam, be sustained if proof of

actual malice on the part of the publisher, Pulliam, falls short of meeting the standards of proof required by *Times?*

Question VI.

Whether the trial court's instructions to the jury in this case which gave the jury a correct instruction of the "actual malice" proof requirements as requested by appellants nonetheless denied appellants due process of law by also giving, over the objections of appellants, additional confusing instructions appropriate to a libel case not involving First Amendment rights and limitations such as the instruction by which the jury was instructed that actual malice might be found based on "a chain of circumstances from which the ultimate fact of actual malice is reasonably and naturally inferable with convincing clarity *from all the testimony and evidence introduced in this case?*" (Emphasis ours).

(Plaintiffs' Requested Instructions No. 1, No. 2A, No. 2B, No. 4, No. 7, Appendix to Appellants' Opening Brief, Court of Appeals, 61-66).

Concise Statement of the Case.

(a) How the Federal Questions Were Raised.

Prior to the retrial of the action in June, 1971, appellants had amended their answer to specifically allege their First Amendment defenses (Pages 11-18, Abstract of Record).

Again by Motion for Directed Verdict at the close of plaintiff's case in chief (R.T. 296-301) and at the close of all evidence (R.T. 569-575), appellants urged their defense of the failure of the evidence to meet First and Fourteenth Amendments to the United

States Constitution standards of required proof of "actual malice" as explicated in *Times v. Sullivan,* 376 U.S. 254.

In their Motion for Judgment n.o.v. appellants again urged the obligation of the court to give effect to the First Amendment rights of appellants and the court's duty to independently evaluate the evidence:

> "*New York Times* makes 'actual malice' a constitutional issue to be decided in the first instance by the trial judge, by way of a motion for summary judgment or for a directed verdict, applying the *Times* test of actual malice or reckless disregard of the truth."
>
> "Defendants (appellants) submit that, upon discharging its constitutional obligation to independently review this record, it will be abundantly clear to this Court that there was no sufficient evidence of either falsity or actual malice to warrant submission of those issues to the jury." (Appellants' Motion for Judgment n.o.v., Abstract of Record, pp. 50-113).

In their Motion for a New Trial, appellants (among other errors) urged the error of the court in denying appellants' Motion for a Directed Verdict based upon insufficiency of proof of actual malice (Abstract of Record, pp. 114-131).

Following the trial court's denial of appellants' Motion for a New Trial or for Judgment n.o.v., appellants filed a Special Action Petition with the Arizona Supreme Court making the claim that the trial court had failed to independently review the sufficiency of the evidence to support a finding of actual malice and had thereby abused and acted in excess of its jurisdiction. The Petition also brought to the attention

of the Arizona Supreme Court its obligation in its role as supervisor of the inferior courts to halt oppressive and harassing litigation involving freedom of the press and freedom of speech when the lack of merit in such litigation was properly brought to its attention.

The Arizona Supreme Court rejected the Petition and appellants sought relief in this Court by appeal which was dismissed.

Appellants raised the issue here presented as to the constitutional validity of the application of Rules, 50(a) and 50(b) ARCP, in their Opening Brief under the heading "Questions Presented", page 19, and at page 31 of their Reply Brief of Appellants brought its First Amendment constitutional responsibility to the attention of the Court of Appeals:

> "Appellants seriously question whether a state court appellate decision contravening a First Amendment right is controlling in subsequent litigation. We doubt a 'policy doctrine', court made, such as 'law of the case', can rise to the dignity of overriding a provision of the United States Constitution involving one of the great freedoms. We doubt the obligation arising from a state court Judge's oath of office requiring him as a judicial officer to support and uphold the Constitution of the United States can be thus lightly laid aside (Article 6, Sec. 26, Arizona Constitution). The duty explicated by the United States Supreme Court which requires that it refuse to be bound by the finding of a trial jury, despite the constitutional guarantee of trial by jury, and independently appraise the evidence as a fact-finding body to assure the integrity of the First Amendment freedoms, clearly points up the obligation which proper respect for these First Amendment guarantees requires of *all* judicial officers."

Following the Decision of the Court of Appeals in which it equated its responsibility for guarding appellants' First Amendment rights with the duty of finding merely that the evidence supported denial of appellants' Motion for a Directed Verdict, appellants in their Motion for Rehearing alleged:

> "3. The court erred in:
>
> "(a) Not itself independently and *de novo* reviewing the record to make sure the standards of proof mandated by the First and Fourteenth Amendments, as explicated in *Times v. Sullivan* and its progeny had been met in the trial court; and in
>
> "(b) Holding that the trial court was only required to review the evidence upon a Motion for a Directed Verdict and upon a Motion for Judgment Notwithstanding the Verdict in a light most favorable to the plaintiff."

"Appellants respectfully urge that the First and Fourteenth Amendments to the United States Constitution, as interpreted by the United States Supreme Court, plainly impose the duty upon the trial court and upon this court equally with a federal court to 'independently search this record' to make sure that the required proof of 'actual malice' has been made with 'convincing clarity'. The improper standard applied by the trial court (and impliedly by this court) in searching the record to make sure the *Sullivan* standards had been met, as a matter of law vitiates the judgment of the trial court and of this court."

ARGUMENT.

(a) The Federal Questions Are Substantial.

Appellant, Michael Padev, was born in 1915 in Bulgaria and grew to young manhood in that country where he entered the newspaper profession which has continued to hold his allegiance to this date.

As a young man, Padev spent time in a Nazi concentration camp where he first became acquainted with Bulgarian communist leaders. Padev escaped from Bulgaria prior to the communist takeover but he was tried and convicted "in absentia" by the communists after he had left Bulgaria and the communists had seized control because of his anti-communist writing. His elderly parents were imprisoned by the communists after Padev's conviction "in absentia" because they refused to renounce him.

Padev has written and lectured on communism since he began an intensive study of communism while a commentator for the British Broadcasting Company in 1947. He studied the history of the takeover by Communists in Russia and followed closely their activities in East Europe and the Far East, including Red China, following World War II.

Padev had studied the two-volume "Lusk" report to the New York Legislature "Revolutionary Radicalism, Its Purpose, History and Tactics" while in England, which exposed communist infiltration in the United States through formation of "people's councils" in the 1917-1920 period. Padev pointed out that (Chapter 7, p. 1,051) communist inspired people's councils were organized in the United States between 1917 and 1920 in 42 states, numbering 320 councils (R.T. 345).

Eugene C. Pulliam published newspapers in Indiana and Arizona. As a young journalist in 1917-1920 he learned of numerous communist-sponsored "people's councils" established from New York to California during this period. Pulliam travelled extensively after World War I and studied communism and its impact on people in the countries taken over by communists.

Pulliam met Padev in Germany, was impressed with his writing and knowledge of communism and employed Padev as Foreign Affairs Editor for the Arizona Republic. Padev came to Arizona in 1956. Pulliam considered Padev as one of the most knowledgeable men on communism he had known.

Padev first met appellee, Church, in the spring of 1959 when they both participated in a panel discussion on American Foreign Policy. At the conclusion of the discussion Padev and Church visited. Padev was shocked at the views Church expressed praising economic democracy in Russia "because big capital doesn't control it."

Subsequently, during Church's campaign for election as Attorney General, Padev followed Church's public statements and speeches in which Church consistently attacked the legislature as venal, the "vested interests", *i.e.*, the insurance and banking industries and the utilities as greedy, grasping, and oppressive of the public, quite often, as Padev expressed "savagely" and "brutally". He freely attacked other public officials, notably the State Land Commissioner. Padev testified that this approach was characteristic of communist preparation for proposing "people's councils" to remedy the asserted evil situation. Appellee did not dispute that Padev's

account of his attacks upon the legislature and other Arizona entities was accurate.

Church addressed a labor union convention in Flagstaff, Arizona, on May 7, 1959. Padev first heard reports of the speech on the radio and read accounts of it in the Republic and Gazette (both Phoenix Newspaper publications).

The newspaper accounts highlighted the attack Church made on the legislature and the "vested interests" and the fact he proposed that labor should take the lead in the formation of "people's councils" to pressure the legislature and offset the evil influence of the "vested interests". The texts of the radio broadcasts through which Padev first learned of the speech were not available but Padev recalled that they reported Church wanted the labor movement to organize a "people's council."

Appellee did not contest upon the trial that the people's council device is a recognized communist device or technique for infiltrating and ultimately seizing control of governments. In one of the newspaper stories, following his proposal that labor sponsor "people's councils" to offset managements' "third house" legislative tool, Church was reported as also recommending that labor join with P.T.A.s, Boy Scouts, etc. in employing lobbyists to influence legislation. Appellee contended —and indeed so did the Arizona Courts in arguing to uphold the jury verdict—that appellants should have realized that Church didn't really mean "people's councils" but instead referred to employing lobbyists. The one newspaper story which contained this reference cannot be reasonably read as connecting the "people's council" proposal with the suggestion that labor employ

lobbyists. Neither the appellee in testimony and argument, nor the Arizona Court in reading Mr. Church's proposal as a plainly innocuous suggestion that labor employ lobbyists, attached any significance to the fact appellee had otherwise, through his repeated and continuous brutal attacks upon Arizona governmental and other institutions, appeared to be adhering to the communist line, at least as Padev understood it.

Padev was "shocked" and "scared" at the fact the Attorney General of the state would propose an idea which Padev believed to be a recommendation that Arizona labor sponsor a communistic device and technique for infiltrating governments and seizing political power. Counsel for appellee, in his Opening Statement to the jury of the evidence appellee would present (R.T. Vol. I, p. 11) stated that appellee, Padev, reacted "hysterically" to Church's proposal.

Padev explained and documented his statements as to how communists work, that the "communist device of first condemning the local or the national legislature, the established form of government in very brutal terms" is found described "in almost every book on the communist take-over of governments" and that this is followed by "proposing a people's council" which "gradually dominates the legislature and then gradually takes over." It was this knowledge which caused Padev to react, as appellee's counsel expressed it "hysterically" to the proposal.

As Foreign Affairs Editor, local political matters were not within the scope of his editorial and writing responsibilities. However, because of his concern, Padev spent two to three days researching the literature

on communism and began writing the editorial in question, of his own volition.

Padev talked with Pulliam by phone after he had completed the editorial. Pulliam had also read the newspaper articles and heard the radio reports of the speech. Pulliam questioned Padev as to the fact "people's councils" were indeed communist infiltration devices and agreed that the idea Church had proposed was very dangerous and must be exposed. He approved the editorial because he had complete confidence in Padev and because of Pulliam's own knowledge of communism, and directed that the editorial be published. The editorial was plainly indentified as an "editorial", and was titled "Communism and Mr. Church", and was run on the front page of the Arizona Republic.

The editorial at its outset identified as its subject "the dangerous left-wing ideas of Attorney General Wade Church" exemplified by "his proposal for the setting up of a 'people's council' in Arizona."

The editorial then discussed the assertion by the Arizona Attorney General that the Arizona Legislature was dominated by "special interests" and that Church proposed that labor cause the selection of "people's councils" run by labor to tell the legislature what to do.

The editorial then traced the history of the "people's council" idea as sponsored by communists and identified it as of communistic origin.

It concluded by asking if Church advocated socialism or communism in Arizona and stating that Church owed the people of Arizona an explanation as to just what he did recommend.

Both Padev and Pulliam testified that they did not intend a personal attack on Church; that their sole purpose was to expose and destroy a "dangerous idea". There was no testimony as to whether or not either Padev or Pulliam gave any thought to or discussed if Church in fact was a communist.

Padev testified he presumed Church was not a communist; he didn't think he was a communist; Pulliam said, in effect, he didn't know. Their only discussion as reflected by the record was with respect to the fact Church's proposal in their opinion was a dangerous proposal with a history of communist utilization, often first advocated by innocent dupes.

Ralph de Toledano, a noted writer and commentator with long expertise in communism, for eleven years an editor of Newsweek and its expert on communism, testified, and there was no effort to disprove the testimony—that the use of the phrase "people's council" to one knowledgeable about communism is almost a phrase of art as referring to a communistic technique for infiltration of governments and for seizing political power.

Church had promptly sued appellants for libel and on the first trial the jury awarded Church a total of $50,000 as actual and punitive damages.

On appeal, the Arizona Supreme Court reversed for error in instructions but refused to direct a dismissal of the action. This Court denied certiorari (394 U.S. 959).

A judgment affirmed by the Court of Appeals, with accrued interest, now stands at an amount in excess of $600,000. It rests upon the adamant refusal

of the Arizona Courts to accept and apply the teaching of *Times v. Sullivan,* 376 U.S. 254, and related decisions of this Court explicating the guarantees of free speech and free press as assured by the First and Fourteenth Amendments to the United States Constitution.

The Arizona Courts have been unwilling to read and apply Rules 50(a) and 50(b), Arizona Rules of Civil Procedure, and Section 12-2102 A.R.S. as compatible with the standards, stated "with convincing clarity" in *Times* of the evidentiary support required to sustain a plaintiff's claim of "actual malice" sufficient to permit such plaintiff to prevail in an action brought by a public official as plaintiff, to recover damages from a newspaper publisher for an asserted libel.

Unless newspaper publishers and writers sued for damages for an asserted libel by a public official in the Arizona Courts are "second class citizens" entitled only to such crumbs from the *Times* standards of actual malice proof requirements as Arizona Courts may see fit to toss such defendants, substantial federal questions are presented.

All judges in the Arizona State Judicial System are required to take an oath of office requiring that such judge will support the Constitution of the United States. Article 6, Section 26, Arizona Constitution.

It is the obligation of the trial judges and the judges of the appellate courts of Arizona, equally with judges in the federal system, to reject interpretation and application of state statutes repugnant to the United States Constitution and to safeguard and protect the federal constitutional rights of litigants before them.

Irvin v. Dowd, 359 U.S. 394, 3 L.Ed.2d 900, 79 S.Ct. 825;

Mooney v. Holohan, 294 U.S. 103, 79 L.Ed. 791, 55 S.Ct. 340;

Robb v. Connolly, 111 U.S. 624, 637, 28 L.Ed 542, 4 S.Ct. 544.

The restriction placed upon trial judges by the Court of Appeals' ruling, and impliedly accepted as binding on it by the Court of Appeals in its consideration of the actual malice proof question, is incompatible with the test this Court has oft times repeated—requiring that the proof must be sufficient to justify a finding of "actual malice" with "convincing clarity" before a verdict against a newspaper publisher or writer may be permitted.

If the trial and appellate judges in reviewing the proof of actual malice are required to slant the evidence in favor of the plaintiff—even though in the independent judgment of such judges, this is unjustified; if judges are required to draw inferences in favor of the plaintiff which their intelligence and judgment rejects as not warranted and to believe implicitly all evidence not inherently improbable even though their experience and judgment would reject parts thereof, a determination under such restrictions that, to the mind of that judge, the evidence is sufficient to justify a finding of actual malice with "convincing clarity" is impossible. A mind is not "convinced" by evidence it rejects or by inferences it considers unwarranted.

> "It is now so well settled that the Court was able to speak in *Kern-Limerick Inc. v. Scurlock,* 347 U.S. 110, 121, 98 L.ed 546, 566, 74 S.Ct. 403, of the 'long course of judicial construction which establishes as a principle that the duty

> rests on this Court to decide for itself facts or construction upon which federal constitutional issues rest.' "
>
> *Napue v. Illinois,* 360 U.S. 264, 3 L.Ed.2d 1217, 79 S.Ct. 1173 (at 1222, 3 L.Ed.2d).

Disregard for one of a litigant's First Amendment "great freedoms" is outrageous and a violation of the constitutional guarantees involved whether it occurs at the state court's level or at the level of the highest court of the United States. A ruling by a state appellate court which sanctions a lesser concern for federal constitutional rights by a state court than the concern which such rights would excite in the federal system should be struck down.

Appellants respectfully urge that the questions presented are so substantial to require plenary consideration with briefs on the merits and oral arguments for their resolution.

Respectfully submitted,

MARK WILMER,
Counsel for Appellants.

APPENDIX.

Opinion.

In the Court of Appeals, State of Arizona, Division One.

Phoneix Newspapers, Inc., a corporation; Eugene C. Pulliam and Michael Padev, Appellants, v. Wade Church, Appellee. 1 CA-CIV 1990, Department B.

Appeal from the Superior Court of Maricopa County

Cause No. C-107395

The Honorable Warren L. McCarthy, Judge

AFFIRMED IN PART
REVERSED IN PART

Snell & Wilmer, by Mark Wilmer, Attorneys for Appellants, Phoenix, Arizona.

Goldstein, Mason, Bistrow & Ramras, Ltd., by Philip T. Goldstein, Phoenix, Arizona.

and

Tonkoff, Dauber & Shaw, Attorneys for Appellee, Yakima, Washington.

Filed: July 15, 1975.

HAIRE, Chief Judge, Division 1.

This appeal results from judgments entered in an action for damages for civil libel brought against a corporate defendant (Phoenix Newspapers, Inc.), its president and publisher (Eugene C. Pulliam) and its foreign affairs editor (Michael Padev). The plaintiff, the Attorney General of the State of Arizona, at the time of the alleged libel, claimed damages based

upon an editorial written by the defendant foreign affairs editor and published in the corporate defendant's newspaper with the approval of defendant Pulliam.

This is the second appeal in this matter. *See* PHOENIX NEWSPAPERS, INC. v. CHURCH, 103 Ariz. 582, 447 P.2d 840 (1968). The first trial resulted in a jury verdict and judgment against the defendants for $30,000 actual and $20,000 punitive damages. The defendants appealed from the first judgment and the Arizona Supreme Court reversed, holding that the instructions to the jury concerning actual malice did not comply with federal constitutional requirements enunciated in NEW YORK TIMES v. SULLIVAN, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686 (1964). Upon retrial, the jury awarded the plaintiff $250,000 actual damages and $235,000 punitive damages against each of the defendants.

Inasmuch as the evidence introduced during the second trial was in most respects substantially identical to that introduced in the first trial, we will not attempt to set forth the background facts pertinent to the libel claim. These facts have been stated in detail by the Arizona Supreme Court in its prior opinion, and the reader is referred to that opinion for the background facts essential to an understanding of this opinion.

On this appeal the defendants present some fourteen separate questions as a basis for reversal. Where appropriate, we will combine various of these questions for purposes of discussion.

THE ALLEGED MISCONDUCT OF PLAINTIFF'S COUNSEL

In the first three questions presented, defendants complain of assorted instances of alleged misconduct and prejudicial statements by counsel during the course of the trial and during jury argument. Defendants contend that, taken collectively, a pattern of intentional misconduct is shown which constitutes *fundamental* error effectively denying defendants a fair trial.

One of the complaints involved jury argument by defendants' counsel, who quoted as factual an alleged conversation between the publisher, Pulliam, and the foreign affairs editor, Padev, which never took place. Examples of such quoted fictitious statements are:

> "Mr. Pulliam, who was not a gentle man—he might be a gentleman, but not a gentle man, he said, 'Don't you let Marquardt write that editorial. I want you to indulge in the tactics that you well know is employed by the communists. I want you to pervert the truth in this case,'
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> 'I want you to write an editorial which will connect him up with communist philosophy. That is the surest way to end this Attorney General's career.'
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> "And without any consideration saying, 'Annihilate him, Padev. You adopt that arrogance—' that you saw demonstrated on the stand, refusal to abide or answer any questions, '—you pervert the truth in this case. That's another trait. In your godless way, annihilate him.' You have to teach the publishing company here."

Defendants complain that the foregoing statements were improper because of the lack of any evidentiary basis, and urge that they were highly inflammatory and prejudicial to the defendants. We tend to agree, although from our position it is difficult to assess the depth of the effect which these statements may have had on the jury. In this connection, we note that there was no objection to these statements at the time they were made, nor was there any request for a mistrial or for a curative instruction prior to the time the jury retired. Also, although the defendants filed a motion for a new trial, they did not raise any issue therein concerning these statements so as to give the trial judge an opportunity to consider their possible impact on the jury. For these reasons, we do not consider that, in and of themselves, these statements, although improper, constitute a sufficient basis for reversal.

Defendants also contend that fundamental error resulted from questions by plaintiff's counsel in the course of trial concerning the results of his campaign for re-election, despite the fact that the court had prior thereto ruled that the defeat of plaintiff was inadmissible. It is true that the trial judge instructed the jury that it should attach no significance to the fact that the plaintiff was not re-elected Attorney General. Although in their opening brief defendants refer to a ruling of the court that such evidence was inadmissible, no reference is made, in either the opening or reply briefs to the transcript relating to this ruling. Plaintiff asserts that no such ruling was made, and we have found none.

In addition to the foregoing, defendants also complain that plaintiff's counsel repeatedly misrepresented the substance of the allegedly libelous editorial to the jury by stating that the editorial in fact called the plaintiff a communist.

The record does reveal that plaintiff's counsel made such representations repeatedly, both in the form of questions while examining witnesses and during jury arguments. Typical examples are found in counsel's jury argument as follows:

> "You recall at the outset of this proceeding, when I addressed you, I told you that you must accept as a fact, or you must accept as a firm and conclusive hypothesis that the editorial, as a matter of law, charged Mr. Church with being a communist and advocating a communist sympathy dedicated to the violent overthrow of the democratic process. This you must start with.
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> "So in effect what this Court is telling you at the outset, and which you must accept as the gospel, is that this defendant newspaper, by the publication of this article, called this man a communist and ideologically sympathetic with the communist ideology of violent overthrow of our democratic institutions. What the law is saying is that there is no argument about this, because to call a man a communist, we say, is to cast him in the well of loneliness, is to cast him in a situation of opprobrium and, therefore, we say, as a fact, historically now, that to call a man a communist is to engage in licentious publication. That's what this case is about. I say

to you, ladies and gentlemen, that the defendant in this case forfeited its right to the protection and mantle of the First Amendment, and entered into the domain of licentious publication by calling this man a communist, especially when they did not believe that this man was a communist or was ideologically sympathetic with the communist way of life."

This Court recognizes that the editorial here involved did not in so many words directly label plaintiff a communist or a communist sympathizer. Such a conclusion, if to be drawn at all, must result from inferences drawn by the reader from the total contents of the editorial. However, plaintiff's counsel's remarks must be considered in the context of the prior rulings made in this case, with particular consideration being given to the Arizona Supreme Court's opinion on the prior appeal. In that opinion, one of the major issues discussed was whether the trial court had erroneously ruled prior to trial that the editorial was libelous per se. Over the defendant's strenuous contentions that, at most the editorial was susceptible of two meanings, one libelous and the other non-libelous, the Arizona Supreme Court upheld the trial court's ruling that the editorial was libelous on its face, that is, libelous per se.[1]

This holding constituted a finding that, as a matter of law, and without resort to evidence other than the face of the editorial, it was such as to bring plaintiff into disrepute, contempt, ridicule or to consti-

[1]The Arizona Supreme Court's opinion was not unanimous on this point—two justices dissented.

tute an impeachment of his honesty, integrity, virtue or reputation. ILITZKY v. GOODMAN, 57 Ariz. 216, 112 P.2d 860 (1941); BERG v. HOHENSTEIN, 13 Ariz. App. 583, 479 P.2d 730 (1971), 50 Am. Jur. 2d Libel and Slander, § 9. Even though this Court might have reached a contrary decision on this question, we are bound by the Arizona Supreme Court's prior determination. Being bound by that determination, we must examine the prior opinion to determine what the "libel" was that the Arizona Supreme Court found apparent on the face of the editorial. Did the Court find that the editorial libeled plaintiff by calling him a communist? We think not. A fair summary of Justice Lockwood's opinion on this point (concurred in by Justice McFarland) is that the editorial libeled plaintiff by charging him with communist sympathies, charging that he espoused a communist idea involving intimidation, blackmail and terrorism.[2] There is no support in Justice Lockwood's opinion for the position that the Court's ruling finding the editorial libelous per

[2]Justice Lockwood states:

"The insinuation that 'Mr. Church's idea,' embodies and approves of communist methods of intimidation, blackmail and terror, is so apparent here as to leave no room for argument.

* * *

"The whole thrust of the editorial is to link inseparably Wade Church and the idea of a 'people's council' to the communist 'people's council', thus charging him with espousing a communist doctrine involving intimidation, blackmail and terrorism. This is clearly no less than a charge of being in sympathy with communism in its lawless and violent aspects.

* * *

"It is absurd to assert that under such circumstances the editorial, as claimed by the defendants, merely attacked plaintiff's idea, and therefore was completely lacking in any accusation against plaintiff himself. It was basically a statement that plaintiff's attitude, expressed by his idea, was sympathetic with violent communist methods. 103 Ariz. at 588

se included a finding that, as a matter of law, it called plaintiff a communist. Justice Struckmeyer in his specially concurring opinion, although using different language, expressed basically the same idea as Justice Lockwood, again furnishing no support for plaintiff's assertion that the libelous per se ruling constituted a determination by the Court that the editorial called plaintiff a communist.[3]

When defendants' counsel objected during argument to plaintiff's continued assertions in this regard, the trial court ruled as follows:

> "The court will instruct the jury the article constitutes a libel per se, and the court will so define it."

In the context in which the ruling was given, it is very difficult to determine whether the trial judge, by the above-quoted ruling, intended to rule that, as

[3]Justice Struckmeyer states:

"These statements charge, not as an expression of opinion but as a positive assertion of fact, that Church proposed creating a people's council in Arizona to function just the way the councils that the Communist Party set up under Lenin functioned, they being formed for the purpose of intimidating, blackmailing and terrorizing legislatures and that this is the means of the Communists' seizure of power. It can only be understood to mean that Church was advocating the seizure of power through unlawful acts in the same manner as did the Communists, thereby destroying the democratic government of Arizona. The rhetorical question, 'Does he [Church] advocate Communism,' having already been answered by the previous purportedly factual statements, does not ameliorate the serious nature of the charges but serves rather to drive home to the reader the conclusion that Church was indeed advocating Communism.

"That parts of the editorial may be fairly susceptible of another or other interpretations, that is to say, are not libelous per se, does not detract from or exclude the clear charge that Church wished to operate in the same way as the Communists, by intimidation, blackmail and terror." 103 Ariz. at 598.

a matter of law, the editorial did call plaintiff a communist, or whether he was sustaining defense counsel's objection, thereby indicating that the "libelous per se" ruling did not constitute an instruction to the jury that the editorial called plaintiff a communist. An examination of the court's instructions on libel are equally as confusing on this point.[4] The only factual circumstance specified in the court's instruction as being libelous per se was the imputation to a person that he was *either a communist or a communist sympathizer.* This comment was followed by the court's preemptory instruction that ". . . The court finds as a matter of law, that the defendant's publication is libelous per se." In our opinion the natural conclusion which the jury would draw from the foregoing is that the

[4]The Court's instructions on libel were as follows:

"This present action is commonly known and termed a libel suit. For the purpose of this action, I define libel to you as every publication which tends to bring any person into disrepute, contempt, ridicule or tends to impeach his honesty or integrity, virtue or reputation as libelous per se. Per se meaning libelous in itself without other proof. I further instruct you that the word tend means to have influence toward producing a certain effect or to exert an influence. *I further instruct you that it would be libelous in itself or libelous per se to impute to a person that he is either a communist or is a communist sympathizer.*

"I instruct you that to render a statement libelous it is not necessary that the charge be made in a direct, positive or open manner. A mere insinuation may be as actionable as a positive assertion, if the meaning is plain. Likewise, the charge or reference may be made by way of asking a question, if the meaning is plain.

"I instruct you that the Court finds, as a matter of law, that the defendants' publication is libelous per se. That is, libelous in itself without proof on the part of plaintiff that said publication is libelous, and you are not to concern yourselves with this issue. All testimony and evidence admitted in this case relates to the remaining issues which are one, truth or falsity; two, actual malice, as will be herein defined, and three, damages." (Emphasis added).

trial judge did intend that the jury consider that, as a matter of law, the editorial called plaintiff a communist.

This conclusion leads us to a consideration of the question of what difference did all this make? Or, as stated by plaintiff's counsel in his answering brief, "in the context of this case, this [calling plaintiff a communist as opposed to stating that he espoused communist sympathies] was a distinction without a difference." However defendants' counsel argues that in the context of this case such a distinction was all important in view of the NEW YORK TIMES v. SULLIVAN test for actual malice. As stated by the United States Supreme Court in that decision:

> "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, *with knowledge that it was*
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> *false* or with reckless disregard of whether it was false or not." 376 U.S. at 279-80 (Emphasis added).

If, as a matter of law, the editorial called plaintiff a communist, and if, as admitted by both defendants Pulliam and Padev in the first trial, neither believed that plaintiff was a communist, then it would conclusively follow that the editorial was published with the "actual malice" required under the TIMES test. This was the exact argument made by plaintiff's counsel to the jury.[5]

[5]Plaintiff's counsel argued as follows on the question of malice:

From the foregoing we conclude that plaintiff's counsel's conduct in this regard was erroneous and prejudicial. The question then arises as to whether defendants' counsel, by his repeated failure to object, has waived the right to urge this question on appeal. In reviewing defendants' motion for new trial, we note the following:

> "During his closing argument, plaintiff's counsel stated to the jury on several occasions that the Court had ruled, as a matter of law, that the editorial complained of was libelous per se because it called plaintiff a Communist. *Althoug'. the Court sustained defendants' objection that such argument was improper, the damage had already been done.*" (Emphasis added).

From the above, two conclusions can be drawn. First, it will be noted that defendants' counsel apparently felt at the time of trial that the trial judge's previously referred to ambiguous ruling did actually sustain his one and only objection. Second, counsel also felt that the damage had already been done by that time. Plaintiff's counsel further points out that defendants did not make any further efforts in this regard to cure any presumed prejudicial effect—counsel did not ask for an admonition by the trial judge to the jury; he did not ask for a mistrial out of the presence of the jury; nor did he request a curative instruction. The rule usually applicable to appellate review is recognized by both parties and needs no extensive citation

"What is the evidence? The evidence with convincing clarity came out of the defendants' own mouths. *They didn't believe that this man was a communist,* nor did he advocate the violent overthrow of our Legislature or our Government." (Emphasis added).

of authorities. This rule is stated in CITY OF PRESCOTT v. SUMID, 30 Ariz. 347, 247 P. 122 (1926) as follows:

> "That remarks of this nature were highly improper and beyond the legitimate limits of argument cannot be questioned, and appellate courts have frequently reversed cases for just such misconduct. It is nevertheless true that the usual practice requires objection to be made at the time, and that the court be requested to admonish the jury to disregard the improper conduct, or an appellate tribunal will not consider it. *Crumpton v. United States,* 138 U.S. 361, 34 L.Ed. 958, 11 Sup. Ct. Rep. 355 (see, also, Rose's U.S. Notes); *Rush v. French,* 1 Ariz. 99, 25 Pac. 816; 3 C.J. 862-864.
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> "The presumption is that an admonition to the jury by the court will remove the effect of the improper remarks. Unless, therefore, it appears that the misconduct was of so serious a nature that no admonition or instructions by the court could undo the damage, a failure to make timely objection is a waiver of error. *Scott v. Times-Mirror Co.,* 181 Cal. 345, 12 A.L.R. 1007, 18 Pac. 672; *In re Thomas,* 26 Colo. 110, 56 Pac. 907.
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> "Remarks made by counsel in the heat of argument are always taken by reasonable men 'cum grano salis,' and when their impropriety is called to the attention of the jury by the court, it is but rarely that harm results." 30 Ariz. at 355-356.

Notwithstanding the above, defendants contend that the total effect of the several alleged instances of misconduct of plaintiff's counsel were such as to require the trial judge, on his own motion, to step in and take curative action, citing among other decisions, BELFIELD v. COOP, 8 Ill. 2d 293, 134 N.E. 2d 249 (1956), wherein the Illinois Supreme Court stated:

> "If the argument of counsel is seriously prejudicial, a court should, of its own motion, stop the argument and direct the jury not to consider it. McWilliams v. Sentinel Publishing Co., 339 Ill. App. 83, 89 N.E. 2d 266; Rudolph v. City of Chicago, 2 Ill. App.2d 370, 119 N.E. 2d 528. If prejudicial arguments are made without objection of counsel or interference of the trial court to the extent that the parties litigant cannot receive a fair trial and the judicial process stand without deterioration, then upon review this court may consider such assignments of error, even though no objection was made and no ruling made or preserved thereon." 8 Ill.2d at 313, 134 N.E. 2d at 259.

We have reviewed the entire transcript in this matter, including the arguments of counsel, and do not find sufficient justification to hold that the trial judge should have taken positive action on his own motion in connection with the alleged instances of counsel's misconduct. In this connection we recognize that defense counsel's failure to object in many instances was no doubt dictated by strategic considerations—considerations that, given the posture of this particular case, the

nature of the subject matter and the identity of the parties, would, to many experienced practitioners, support the decisions which he made (without benefit of hindsight). However, in the absence of extreme factual circumstances which might justify the application of the principle stated in BELFIELD, *supra,* an appellate court cannot assume that the transgressions of plaintiff's counsel could not have been effectively cured by prompt trial court action initiated by appropriate efforts of opposing counsel at the trial level.

QUESTION NO. IV

ALLEGED ERROR IN LIBEL INSTRUCTIONS GIVEN AT PLAINTIFF'S REQUEST

At the request of plaintiff, and over defendants' objections, the court instructed the jury as follows:

PLAINTIFF'S REQUESTED INSTRUCTION NO. 1:

> "This present action is commonly known and termed a libel suit. For the purpose of this action, I define libel to you as every publication which tends to bring any person into disrepute, contempt, ridicule or tends to impeach his honesty or integrity, virtue or reputation as libelous per se. Per se meaning libelous in itself without other proof. I further instruct you that the word tend means to have influence toward producing a certain effect or to exert an influence. *I further instruct you that it would be libelous in itself or libelous per se to impute to a person that he is either a communist or is a communist sympathizer.*" (Emphasis added).

PLAINTIFF'S REQUESTED INSTRUCTION NO. 2A:

> "I instruct you that to render a statement libelous it is not necessary that the charge be made in a direct, positive or open manner. A mere insinuation may be as actionable as a positive assertion, if the meaning is plain. Likewise, the charge or reference may be made by way of asking a question, if the meaning is plain."

PLAINTIFF'S REQUESTED INSTRUCTION NO. 2B

> "I instruct you that the Court finds, as a matter of law, that the defendants' publication is libelous per se. That is, libelous in itself without proof on the part of plaintiff that said publication is libelous, and you are not to concern yourselves with this issue. * * *"

* * *

PLAINTIFF'S REQUESTED INSTRUCTION NO. 4:

> "You are instructed that the defendants' publication is to be construed by you in its ordinary and natural sense. You are to consider the publication in its entirety and to construe the sense of the words which appear in the publication and the ideas adopted in their plain and ordinary meaning as intended to be conveyed to persons of ordinary understanding."

Defendants complain that in view of the court's giving of Instruction 2B finding the publication libelous per se as a matter of law, portions of Instruction No. 1, all of Instruction 2A and all of Instruction 4, while possibly correct as abstract statements of the

law, were erroneously given and could only serve to create confusion in the minds of the jury. We agree that the last two sentences of plaintiff's Instruction No. 1 and all of plaintiff's Instruction 2A were erroneously given. By finding the publication libelous per se as a matter of law, the court removed this issue from the jury's consideration and thus there was no reason to give to the jury principles to guide their deliberations in this regard. However, immediately following the giving of plaintiff's Instruction 2B, the court instructed the jury:

> "All testimony and evidence admitted in this case relates to the remaining issues which are one, truth or falsity; two, actual malice, as will be herein defined; and three, damages."

Considering these instructions together, we cannot see how there could have been any substantial confusion created in the minds of the members of the jury by these instructions.

Turning now to plaintiff's Instruction No. 4, we first note that this instruction did not immediately follow the court's instructions on the libelous per se issue, but rather followed the court's instructions on actual malice. The question of actual malice had been left to the jury under appropriate instructions, and we perceive no error in the giving of plaintiff's Instruction No. 4 when considered in that context.

QUESTIONS NO. V AND VI
PLAINTIFF'S REQUESTED INSTRUCTION ON MALICE

In Question No. V defendants contend that the giving of plaintiff's requested Instruction 2A (quoted *supra*) contravenes TIMES v. SULLIVAN, by impliedly permitting the jury to find against the defendants on insinuation or based on asking a question. The argument is made that telling the jury that a mere insinuation may be as actionable as a direct statement and that the charge or reference may be made by a question impinges upon the standards of proof required by SULLIVAN. To the extent that this argument constitutes an attack upon the trial court's finding that the publication was libelous per se, we can only refer to our previous discussion of the Arizona Supreme Court's decision on the prior appeal and state that we are foreclosed from re-examining this issue. However, the thrust of defendants' argument appears to be related to the "confusion" arguments discussed in Question IV, *supra,* somehow urging that the instruction contravenes the SULLIVAN "clear and convincing evidence" or "with convincing clarity" tests for the proof of actual malice (discussed *infra*). We confess that we are unable to comprehend defendants' arguments in this regard, and therefore reject them.

Defendants phrased their Question VI as follows:

"VI

> "Whether Plaintiff's Requested Instruction No. 7, given as modified by the Court, which permitted the jury to find the appellants guilty of 'actual malice' from 'a chain of circumstances from which

the ultimate fact of actual malice is reasonably and naturally inferable with convincing clarity' constituted reversible error as permitting the jury to find 'actual malice' on the part of appellants by (a) a mere preponderance of the evidence, or (b) by an inference reasonably and naturally flowing from a chain of circumstances 'with convincing clarity'."

Plaintiff's Requested Instruction No. 7, as given, reads as follows:

"I instruct you that it is not necessary, and the plaintiff is not required, to prove actual malice on the part of the defendants by direct evidence. He may establish actual malice on the part of the defendants by a chain of circumstances from which the ultimate fact of actual malice is reasonably and naturally inferable with convincing clarity from all of the testimony and evidence introduced in the case."

It will be noted that Instruction No. 7 is essentially a circumstantial evidence instruction.

Defendants' attack on this instruction appears to be three-fold. First, defendants contend that it contravenes SULLIVAN in that it allows the jury to "find the fact ot actual malice by inference". Defendants make no reference to specific language in SULLIVAN, nor has this Court found anything in SULLIVAN which would indicate an intention to modify traditionally accepted rules relating to the type of proof required to show actual malice. In Arizona, even in criminal actions where the burden of proof is beyond a reasonable doubt, any supposed legal distinction be-

tween the probative value of direct and circumstantial evidence has been abolished. *See* STATE v. HARVILL, 106 Ariz. 386, 476 P.2d 841 (1970). The SULLIVAN test for malice, involving as it does the state of mind of the defendant concerning his knowledge of falsity, would indeed prove difficult to meet if limited to direct proof through admissions or statements made by the defendant. While the SULLIVAN court does impose a high standard of proof—by clear and convincing evidence—we find nothing to indicate an intention to limit evidence on this issue to that traditionally referred to as "direct evidence".

Defendants' second attack upon plaintiff's Instruction No. 7 appears to be based upon a burden of proof argument. Thus counsel states:

"Under this instruction the jury is permitted to find the 'circumstances' from which the malice is to be inferred by any standard of proof acceptable to them or by no standard at all."

Counsel then argues that each fact establishing the chain of circumstances leading to the inference of actual malice must be established by clear and convincing evidence, and that the instruction was therefore defective in only requiring that the ultimate fact of actual malice be inferable with convincing clarity. No citation of authority accompanies defendants' arguments on this point. While we find no decisions directly in point dealing with a "clear and convincing" standard of proof, we do find directly analogous decisions in the criminal law dealing with a "beyond a reasonable doubt" standard. These decisions establish that it is the ultimate issue or particular element of the crime which must be established beyond a reasonable doubt,

and not each circumstance or fact introduced into evidence. UNITED STATES v. HALL, 198 F.2d 726 (2d Cir. 1952); STATE v. PARIS, 43 Wash. 2d 498, 261 P.2d 974 (1953); STATE v. PACK, 106 Kan. 188, 186 P. 742 (1920); 30 Am. Jur. 2d, Evidence § 1172.

In our opinion this same principle is equally applicable to cases involving a "clear and convincing" standard of proof. We therefore reject defendants' attack on Instruction No. 7 in this regard.

As a final challenge to Instruction No. 7, defendants in their reply brief assert that there was no basis in the evidence for circumstantial evidence instruction on actual malice. We will not consider this argument in detail, inasmuch as the objection in the trial court was not made on this basis. Rule 51(a), Rules of Civil Procedure, 16 A.R.S.; WINCHESTER v. PALKO, 18 Ariz. App. 534, 504 P.2d 65 (1973); BROOKER v. CANNY, 103 Ariz. 529, 446 P.2d 929 (1968). We will say, however, that in our opinion there was circumstantial evidence bearing upon the issue of actual malice.

QUESTION NO. X

THE TRIAL COURT'S DUTY RE DEFENDANTS' DIRECTED VERDICT MOTIONS

Through their Question X, the defendants contend that the TIMES v. SULLIVAN clear and convincing standard of proof for actual malice requires that on a motion for directed verdict, the trial judge must make an independent determination as to whether there has been a showing of actual malice, and that in making such a determination he must weigh the evi-

dence, draw such inferences as he deems justified, and make his own determinations comparing the credibility of witnesses. This would be clearly contrary to the normal duty of the trial judge under well-established principles in Arizona law holding that on a motion for directed verdict the trial judge must view the evidence in a light most favorable to the opposing party, accepting the truth of whatever evidence he has introduced, together with all reasonable inferences to be drawn therefrom. DAVIS v. WEBER, 93 Ariz. 312, 380 P.2d 608 (1963); CITY OF PHOENIX v. BROWN, 88 Ariz. 60, 352 P.2d 754 (1960); JOSEPH v. TIBSHERANY, 88 Ariz. 205, 354 P.2d 254 (1960).

There is some support for defendants' contentions. *See* concurring opinion of Judge J. Skelly Wright in WASSERMAN v. TIME, INC., 424 F.2d 920 (D.C. Cir. 1970). However, in our opinion, the correct analysis of the TIMES v. SULLIVAN requirements in this regard is set forth in GUAM FEDERATION OF TEACHERS, LOCAL 1581, A.F.T. v. YSRAEL, 492 F.2d 438 (9th Cir. 1974). There the court considered the same argument being presented here, and held:

> "We think that in a libel case, as in other cases, the party against whom a motion for summary judgment, a motion for a directed verdict, or a motion for a judgment notwithstanding the verdict is made is entitled to have the evidence viewed in the light most favorable to him and to all inferences that can properly be drawn in his favor by the trier of fact. We think, too, that in such cases it is not only not the duty

of the judge or of this court of appeal, to weigh the credibility of the evidence, or to draw inferences in favor of the moving party (except, of course, when no contrary inference can legitimately be drawn), but that neither the judge nor this court on appeal has the authority to weigh credibility or to choose among legitimate inferences in such cases.

"The *standard* against which the evidence must be examined is that of *New York Times* and its progeny. But the *manner* in which the evidence is to be examined in the light of that standard is the same as in all other cases in which it is claimed that a case should not go to the jury. If the evidence, so considered, measures up to the *New York Times* standard, the case is one for the jury, and it is error to grant a directed verdict, as the trial judge did in this case." 492 F.2d at 441. (Emphasis in original).

We therefore reject the contentions advanced by defendants on this issue.

QUESTIONS XI through XIV

LAW OF THE CASE AND SUFFICIENCY OF EVIDENCE RE "KNOWING FALSITY"[6]

In Questions XI through XIV defendants question the applicability of the law of the case doctrine on this appeal, insofar as concerns proof of falsity and defendants' knowledge of such falsity. In the Arizona

[6]In this opinion the use of the term "knowing falsity" or "knowledge of falsity" is intended to encompass the complete test of actual malice set forth in TIMES v. SULLIVAN and previously quoted in this opinion.

Supreme Court's opinion on the first appeal, there is specific language indicating a belief by that Court that the evidence in the first trial would have been sufficient to support a jury finding of knowing falsity, had the jury been properly instructed under the TIMES v. SULLIVAN test. Defendants contend that while the evidence presented at the first trial relating to this issue was substantially repeated in the second trial, there was also introduced new and important additional evidence which negated or made inappropriate the Arizona Supreme Court's prior findings.

Before proceeding further, it must be stated that when a libel is not directly stated, but rather depends upon inferences to be drawn by the reader, as in this case, it becomes difficult to apply the TIMES v. SULLIVAN test with any degree of precision. The difficulty is encountered because all of the facts directly stated in the allegedly libelous publication might well be true. Specifically as to this case, defendants have well summarized the issue as follows:

> "Since it was not disputed that Church [plaintiff] did recommend that labor sponsor 'people's councils' for the purpose stated and since it was not disputed that in fact 'people's councils' had been utilized as an infiltration device both in Europe and the United States, the impropriety charged to [defendants] must be that they claimed he was advocating a people's council of the communist kind when they knew he didn't intend that kind of organization."

In defendants' view, the only evidence presented which could arguably justify a submission to the jury

of this issue was the admission by defendant Padev, and the claimed admission by defendant Pulliam, that they did not believe that the plaintiff was a communist or a communist sympathizer. We do not agree that the evidence on this issue was quite so limited. The jury had before it the newspaper account of the plaintiff's speech which formed the basis for the writing of the editorial. There was extensive testimony concerning Padev's direct experience with, and study of, communist methods and ideology. In our opinion the jury was entitled to consider this evidence in arriving at a determination of whether the defendants necessarily knew that the plaintiff, in his Flagstaff speech, was not advocating a people's council of the kind and having the purpose defendant Padev described in the editorial. The Arizona Supreme Court in its prior opinion took the same view. Thus, Justice Lockwood stated:

> "To the extent that Padev was qualified to testify as to communist theory, institutions, and devices, the factual basis of the statements of the editorial regarding those subjects may be accepted. Yet this could not necessarily overcome the knowledge of falsity of the statements of fact as applied to what the plaintiff proposed in his speech, *as shown by the reportorial accounts immediately following it, and which both defendants Padev and Pulliam testified they had read before the editorial was published.*" (Emphasis added). 103 Ariz. at 595

And in Justice Stuckmeyer's specially concurring opinion:

> "The author of the editorial, Michael Padev, gained his information about Church's speech from

> a newspaper report, which is deserving of being requoted in part since, I believe, it is determinative of the question.
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> * * *
>
> "The newspaper account points out that what Wade Church meant by his use of the phrase 'people's council' was to 'hire full-time personnel to match lobbyists' with other interests. In representative government, lobbying is a lawful and accepted procedure for communicating the wishes of the electorate to the membership of legislatures. *No stretch of the imagination can equate this demoncratic process with the Communist technique for the seizure of power through intimidation, blackmail and terror. The editorial is not only false but the jury could have concluded that Padev must have known it was false.*" (Emphasis added) 103 Ariz. at 598-599.

It is true that on the re-trial new testimony was given relating to the function and practice of editorial writers who write commentary columns on political figures and public events. This evidence came from defendants Padev and Pulliam, and witness Ralph de Toledano. Defendants summarize this testimony as follows:

> "All three witnesses testified unequivocally that a news commentator and editorial writer does not as a matter of course (and necessity) consider whether or not a political figure who makes a public proposal in fact actually believes in and personally supports the proposal made. The proposal may be a 'trial balloon;' it may be a spur of the moment thought; or it may be that the

speaker simply got carried away by his own enthusiasm.

"Once the proposal is publicly made the function of the commentator or editorial writer is to attack it—commend it—ridicule it—or otherwise deal with it."

From the foregoing, defendants argue that if defendant Padev, in writing the editorial in question, as a professional news analyst and commentator routinely accepted the proposal as made by plaintiff Church as a "trial balloon" or as a thoughtless, spur-of-the-moment thing, or even as a rabble-rousing challenge to the "establishment" sort of thing, and proceeded to subject it to a bitter, caustic and devastating barrage of criticism, he was justified in so doing under the now firmly established principles of the law of libel in the area of free press, free speech within which the publication w made.

We agree with the defendant's basic premise that an editorial writer is not required to consider whether a political figure actually believes in and supports proposals which he might publicly make. However, in advancing their arguments, defendants ignore the fundamental issue in this case concerning the public proposal which was actually made by plaintiff, that is, did plaintiff, in his Flagstaff speech, advocate a people's council of the kind and having the purpose defendant Padev described in his editorial? If plaintiff's words were reasonably susceptible to the interpretation that plaintiff advocated a communist-type people's council, then plaintiff's personal undisclosed beliefs and defendants' knowledge or lack of knowledge of those

beliefs, would be immaterial in any libel action which plaintiff might file. Such reasoning is not applicable, however, where, as in this case, the fundamental basis of the plaintiff's complaint is that the defendants' editorial completely and falsely misrepresented the nature of the proposal actually stated by plaintiff.

In our opinion the evidence on the retrial was sufficient to justify the submission of the knowing falsity issue to the jury under the standards promulgated by TIMES v. SULLIVAN. Therefore we need not consider whether the law of the case doctrine in and of itself, would have required that this issue be submitted to the jury on the retrial.

QUESTIONS VII, VIII and IX

PLAINTIFF'S REQUESTED INSTRUCTION CONCERNING THE LIABILITY OF *ALL* DEFENDANTS

Plaintiff's Requested Instruction No. 19 was given by the trial court and reads as follows:

"You are further instructed that a corporation can only act through its agents, employees and officers. And in connection, I instruct you if you bring in a verdict in favor of the plaintiff, it must be against all defendants."

Defendants complain about that portion of the instruction which required the jury to find against *all* defendants if it found its verdict against any defendant. Defendants contend that under the TIMES v. SULLIVAN "actual malice" test, the jury could well have found that one or more of the defendants did not have the requisite knowledge of falsity, and therefore

would not have been liable, notwithstanding possible liability on the part of other defendants. We will discuss this contention as to each defendant separately.

As to the defendant corporation, it is contended that the doctrine of *respondeat superior* is "inapplicable as being over-ridden by the requirement of proof of actual malice." While this contention is somewhat broadly stated, we do not understand defendants' contention to be that under no circumstances can a corporate defendant employer be held liable for libel under the TIMES v. SULLIVAN test. Rather, the argument appears to be that defendant Pulliam had the ultimate authority to approve or disapprove the publishing of the editorial, and that in fact it was he who authorized its publication and it was upon his responsibility that it was published. It is then argued that if defendant Pulliam was free of actual malice then the defendant corporation, Phoenix Newspapers, Inc., could not be said to have been actuated by actual malice notwithstanding any malice which the trial court might find on the part of defendant Padev. In support of this position defendants cite the following language from TIMES v. SULLIVAN:

> "Finally, there is evidence that the Times published the advertisement without checking its accuracy against the news stories in the Times' own files. The mere presence of the stories in the files does not, of course, establish that the Times 'knew' the advertisement was false, *since the state of mind required for actual malice would have to be brought home to the persons in the Times' organization having responsibility for the publication of the advertisement.*" 376 U.S. at 287. (Emphasis added).

We do not find the same meaning in this language from TIMES v. SULLIVAN as is apparently discerned

by defendants. In the facts of personal participation. See authorities cited, 50 Am. Jur. 2d, Libel and Slander, §§ 335, 336. We question the legal soundness of these decisions. *See* FOLWELL v. MILLER, 145 F. 495 (2d Cir. 1906); KNOXVILLE PUB. CO. v. TAYLOR, 31 Tenn. App. 368, 215 S.W.2d 27 (1948). However, regardless of any prior validity which such a concept might have had, it is our opinion that it cannot survive the impact of the "actual malice" principles enunciated in TIMES v. SULLIVAN. We therefore start with the premise that under TIMES v. SULLIVAN, apart from the application of the doctrine of *respondeat superior*, an individual defendant cannot be held liable unless the jury finds that the individual himself has been actuated by actual malice (knowledge of falsity). Applying this principle to the case at hand, before defendant Pulliam could be held liable, the jury was required to find that he, himself, was actuated by actual malice (knowing falsity) when he participated with Padev in the activities culminating in the publication of the editorial. Plaintiff has presented no theory nor has he cited any authority under which any malice found on Padev's part could be imputed to the defendant Pulliam. The evidence on knowledge of falsity was not such that it was inherently applicable equally to both individual defendants on this issue, thereby requiring a finding that either both had knowledge of falsity or that neither had knowledge of falsity. Under the evidence the jury could well have found that defendant Padev had, and defendant Pulliam did not have, such knowledge.

Without going into a detailed review, there was evidence that Padev had written the editorial on his own initiative prior to any conversation with Pulliam, and that Pulliam authorized the publication of the

editorial with a much more limited knowledge of its actual contents than that possessed by Padev; that Padev was the foreign affairs editor of the newspaper and a recognized expert on communism; that because of Padev's expertise, Pulliam had complete confidence in his analysis and views concerning the people's council idea espoused by plaintiff. Further, the evidence in this trial as to Pulliam's knowledge and belief as to whether plaintiff was a communist was much weaker than that of Padev. Based upon this evidence, the jury might well have found that Pulliam did not have actual malice—that is, knowledge that the people's council proposal espoused by plaintiff was not similar or comparable to the people's council idea advocated by communists.

We therefore hold that the giving of Instruction No. 19 constituted reversible error as to defendant Pulliam.

We turn now to the question of whether the giving of Instruction No. 19 constituted reversible error as to the defendant Padev. From what we have previously stated in this opinion, it is obvious that a stronger case of actual malice (knowing falsity) was presented against Padev than was presented against Pulliam. Padev was the initiator and the writer of the editorial. He was the expert on communism. It was based upon his representations concerning people's councils that Pulliam authorized the publication of the editorial. Although the giving of the instruction may have constituted technical error as to Padev, it is difficult to see any prejudice to Padev from an instruction which in essence prohibited a verdict against him, unless a verdict was also returned against Pulliam, against whom a weaker case had been presented.

Counsel argues that the principal prejudice against defendant Padev arises from the fact that Instruction No. 19 requires a finding of liability on his part if liability is found on the part of two "target" defendants, that is, defendant Pulliam and defendant Phoenix Newspapers, Inc. As we have previously stated, any actual malice found on defendant Padev's part would be imputed to defendant Phoenix Newspapers, Inc., thereby automatically requiring a verdict against Phoenix Newspapers under such circumstances. Therefore, Instruction No. 19 was not erroneous insofar as it concerns the linking of defendants Padev and Phoenix Newspapers, Inc. for liability purposes.

As to defendant Pulliam's status as a "target" defendant, we find nothing in the record to support this contention.

The judgment of the trial court is affirmed as to defendants Padev and Phoenix Newspapers, Inc., and reversed as to defendant Pulliam.

/s/ Levi Ray Haire
LEVI RAY HAIRE
CHIEF JUDGE
DIVISION 1

CONCURRING:

/s/ Eino M. Jacobson
EINO M. JACOBSON
PRESIDING JUDGE
DEPARTMENT B

/s/ Jack L. Ogg
JACK L. OGG
JUDGE

Order.

In the Court of Appeals, State of Arizona, Division One.

Phoenix Newspapers, Inc., a corporation; Eugene C. Pulliam and Michael Padev, Appellants, v. Wade Church, Appellee. 1 CA-CIV 1990, DEPARTMENT B, MARICOPA County Superior Court No. C-107395.

Filed: September 11, 1975.

The motion for rehearing and the response thereto were considered by the Court, Presiding Judge Eino M. Jacobson and Judges Levi Ray Haire and Jack L. Ogg participating.

IT IS ORDERED denying the motion.

DATED this 11th day of September, 1975.

/s/ Eino M. Jacobson
EINO M. JACOBSON
PRESIDING JUDGE

A true copy of the foregoing order was mailed this 11th day of September, 1975, to:

Mr. Mark Wilmer, Snell & Wilmer, 3100 Valley Center, Phoenix, Arizona 85073, Attorneys for Appellants.

Mr. Philip T. Goldstein, Goldstein Mason & Ramras, Ltd., 1110 East McDowell Road, Phoenix, Arizona 85006, Attorneys for Appellee.

Supreme Court, State of Arizona, Phoenix 85007.
December 10, 1975

Phoenix Newspapers Inc., a corporation; Eugene C. Pulliam and Michael Padev, Appellants, vs. Wade Church, Appellee. Supreme Court, No. 12365-PR.

Court of Appeals, No. 1 CA-CIV 1990. Maricopa County, No. C-107395.

The following action was taken by the Supreme Court of the State of Arizona on December 9, 1975 in regard to the above-entitled cause:

"ORDERED: Petition for Review—DENIED."

Record returned to the Court of Appeals, Division One, Phoenix, this 10th day of December, 1975.

CLIFFORD H. WARD, Clerk
By /s/ Mary Ann Hopkins
Deputy Clerk

To:

Mark Wilmer, Esq., Snell & Wilmer, 3100 Valley Center, Phoenix, Arizona 85073

Philip T. Goldstein, Esq., Goldstein, Mason & Ramras, 1110 East McDowell Road, Phoenix, Arizona 85006

Tonkoff, Dauber & Shaw, 616 Miller Building, Yakima, Washington 98901

Hon. Warren L. McCarthy, Judge Maricopa County Superior Court, 101 West Jefferson, Phoenix, Arizona 85003

Classie Gantt, Clerk, Court of Appeals, Division One, West Wing, State Capitol Building, Phoenix, Arizona 85007

West Publishing Company, 50 Kellogg Boulevard, St. Paul, Minnesota 55102.

Judgment.

In the Superior Court of the State of Arizona, in and for the County of Maricopa.

Wade Church, Plaintiff, vs. Phoenix Newspapers, Inc., an Arizona corporation, Eugene C. Pulliam, and Michael Padev, Defendants. No. 107395.

The above entitled and numbered cause came on regularly for trial on the 9th day of June, 1971, before the Honorable Warren L. McCarthy, Judge of the above entitled court, and the parties appeared by their respective counsel, and a jury, in accordance with the laws of the State of Arizona, was regularly empanelled and sworn to try said action, and witnesses on the part of the plaintiff and the defendants were sworn and examined, and documentary evidence was introduced by plaintiff and defendants; and after hearing the evidence, the arguments of counsel and instructions of the court, the jury retired to consider their verdict, and subsequently returned into court and the foreman announced that the jury had reached a verdict, and upon presentation to the court of a written form of verdict, the Clerk of the court read and announced that the jury, by its verdict, found for the plaintiff and against the defendants and assessed compensatory damages in the sum of $250,000.00 and fixed plaintiff's punitive damages in the sum of $235,000.00, and the verdict was received and recorded and those jurors who signed the same replied that it was their verdict, and thereafter the verdict was filed with the Clerk of the court, and by reason of the foregoing,

IT IS ORDERED, ADJUDGED AND DECREED that plaintiff, Wade Church, do have and recover judgment against the defendants Phoenix Newspapers, Inc., Eugene C. Pulliam and Michael Padev, and each of them, in the sum of Two Hundred Fifty Thousand Dollars ($250,000.00) as and for plaintiff's compensatory damages, together with the sum of Two Hundred Thirty-five Thousand Dollars ($235,000.00) as and for exem-

plary and punitive damages assessed against the defendants, and each of them, being in the aggregate Four Hundred Eighty-five Thousand Dollars ($485,000.00), with legal interest thereon from the date of the execution hereof.

DONE IN OPEN COURT this 21st day of June, 1971.

Warren L. McCarthy
Warren L. McCarthy
Judge of the Superior Court

(Verification of mailing copy).

"An Editorial

"COMMUNISM AND MR. CHURCH

"NOTHING ILLUSTRATES better the dangerous left-wing ideas of Attorney General Wade Church than his proposals for the setting up of a 'people's council' in Arizona.

"According to Church our legislature is 'dominated' by special interest groups operating from the Adams Hotel in Phoenix. For this reason the legislature does not reflect the will of the majority of the people, the attorney general argues. To 'correct' this situation Mr. Church proposes the selection of a 'people's council' which presumably, should tell the legislature what to do and how to do it. Mr. Church thinks that this 'people's council' should be organized and run by Arizona's labor unions.

"MR. CHURCH'S 'people's council' idea comes straight from the writings of Karl Marx, the god of 'scientific socialism' and the prophet of the international Communist movement. The same idea was the cornerstone of the philosophy of Lenin, the founder of the Soviet state. The same idea is the political basis of

all Communist regimes all over the world. The story of communism in power is essentially a story of the 'people's council' idea of government put into practice.

"When the Russian Czarist government fell apart early in 1917, the Russian democratic parties, which enjoyed the overwhelming support of the Russian people, formed democratically elected government organizations, including a central (federal) government responsible to an assembly (parliament).

"Later on the Russians elected a constituent assembly.

"In all these elected bodies the Communists had but a tiny and insignificant minority.

"But the Communists were not interested in votes—they never are. They were, as they are, interested in power alone.

"THE COMMUNIST PARTY, under Lenin, created its own 'people's councils,' which functioned independently of the government, just the way Wade Church wants the Arizona 'people's council' to function.

"These Russian 'people's councils' were supposed to consist of 'soldiers and sailors' and 'workers and peasants,' but were, in fact, dominated and manipulated by the Communists.

"It was these councils that played the most decisive role in the overthrow of the Russian national all-party government headed by the social democratic leader, Kerensky.

"It was these 'people's councils' that completed the destruction of the Russian 'bourgeois' (capitalist) state and imposed the Communist regime. The first Communist cabinet, headed by Lenin, was actually called

a people's council of commissars. In Russian the word 'soviet' means 'council,' and the Soviet government is quite properly called 'council government.'

"THE COMMUNISTS employed the same 'council' technique in East Europe, as well as in the Far East, including Red China. People's councils, at times called patriotic councils, national councils, anti-Fascist councils democratic councils, peace councils, and so on, were formed by the Communists everywhere with the sole purpose of 'guiding,' i.e. intimidating, blackmailing, and terrorizing the elected parliaments and district assemblies, which were not, at the beginning, Communist controlled.

"The 'people's council' idea is only another name for the Communist technique of the seizure of power and for the Communist way of enabling a small minority to control and eventually to rule the huge majority.

According to Communist theoreticians, from Marx and Lenin to Krushchev and Mao, only the 'advance guard' (the Communist leaders) of the 'working class' (the majority of the people) know how to interpret the 'historical laws of development' of our society.

"This supposedly enables the Communist leaders to know best what's good for the rest of us.

"Communists believe that they have the right and the duty 'to guide' the masses of humanity along the 'correct road' leading to socialism. The Communist-controlled 'people's councils' do this 'guidance' work with regard to the state.

"THE 'PEOPLE'S COUNCIL' idea of Attorney General Church is therefore nothing but a disguised Marxist idea of minority rule over the majority.

"We are certain that most Arizonans will resolutely reject Mr. Church's alarming conceptions of government.

"We also sincerely hope that the Arizona labor movement—at whose annual convention last week Mr. Church first voiced his 'people's council' proposal—will have the good sense to disassociate itself completely from such dangerous ideology, which can only do harm to the rank and file working man.

"BUT MR. CHURCH, himself, owes an urgent explanation to the public. He has to state, publicly and clearly, whether or not his 'people's council' proposals are part and parcel of a general Marxist philosophy of government and of life.

"Does Mr. Church advocate socialism for Arizona?

"Does he advocate communism?

"Does he want 'people's councils' to take over our state government in the way they have taken over the governments of all the unhappy lands behind the Communist Iron Curtain?"

3. DEFENDANTS' EXHIBIT 13 IN EVIDENCE
ARTICLE OF MAY 7, 1959—"LABOR URGED TO COMBAT 'THIRD HOUSE' "
By Bruce Kipp—Gazette Staff Writer

"Flagstaff, May 7—Atty. Gen. Wade Church advocates the creation of a 'people's council' to offset the effects of a 'third house' of the legislature through which, he says, management dominates the lawmaking in Arizona.

"The 50-year-old Phoenix Democrat provided the dessert for a banquet-barbecue-served delegates to the state AFL-CIO convention which concludes here today.

"Toting up a list of people's needs, which included his people's council and a second major newspaper for Phoenix, Church said 'if labor won't spearhead this movement, nobody will do it.

" 'If we don't do it, democracy as we conceive it and as our children learn it will not last in this state,' he said. 'And our children are going to live in a very shabby world.' "

. . . .

(The balance of this Exhibit is found on pages 10 through 13, Appendix to Appellants' Opening Brief).

4. PLAINTIFF'S EXHIBIT 15 IN EVIDENCE
ARTICLE—ARIZONA REPUBLIC
May 7, 1959

"CHURCH FLAYS LEGISLATURE'S 'THIRD HOUSE' "

"Flagstaff (Special)—Atty. Gen. Wade Church last night called for a 'people's council' to offset the special interest 'third house' which rules Arizona from Hotel Adams.

"He urged organized labor to join churches, PTAs, minority groups, and others and hire full-time personnel to match lobbyists with the mines, power group, construction industry, finance interests, and cattle groups.

"Addressing the Arizona State AFL-CIO convention, Church struck out at numerous influential Arizona groups.

" 'Power rates are exorbitant in this state,' declared Church. once secretary-treasurer of the old Arizona State Federation of Labor.

"State land is being sold to speculators for 7 per cent down and 38 years to pay and land is not being set aside for vital institutions, such as schools, Church continued.

"He rapped state laws which allow banks to keep millions of dollars of public money without paying the state interest. California, which gets bids for storing public money, get an average interest return of 3 per cent, compared to Arizona's 1 per cent,. Church asserted.

"And Church said there must be a second major newspaper in the Phoenix area. He said he hoped some paper like the Washington Post or St. Louis Post-Dispatch would come in and set up a paper in Phoenix, assuring the new venture of proper capitalization."

(A third Exhibit in evidence, newspaper releases, is found at pages 7 through 13 of the Appendix to Appellants' Opening Brief).